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Extrajudicial Dissolution of Agreements and the Specter of Commercial Vigilantism

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In 1984, the legislature comprehensively revised the articles of the Civil Code treating obligations. While the revision keeps intact many of the principles of the Civil Code of 1870, it also sets forth several new approaches. One change empowers a contracting party to declare unilaterally the dissolution of an agreement.¹ Although the adjoining comments suggest that vesting a disappointed creditor with this ability does not represent a change the law,² the legislation potentially broadens a contracting party's right to act on his own without court supervision when disagreements arise concerning the performance of the parties. Also, and unfortunately, the revision increases the likelihood of contractual dissolution in the place of specific performance. This paper examines the non-judicial method of contract dissolution under the current articles of the Civil Code and the troubling problem of abuse.

I. DISSOLUTION OF CONTRACTS UNDER THE CIVIL CODE OF 1870 AND THE IMPACT OF ARTICLES 2046 AND 2047

Under Article 1779 of the Civil Code of 1870, an enforceable conventional obligation contained four elements: capacity of the parties, consent, cause for the pact, and a certain and lawful object of the bargain. Article 1883 of the Civil Code of 1870 provided that the object of every contract was "something which one or both of the parties oblige themselves to give, or to do, or not to do." In short, performance was the "true object of an obligation."³ That is what "the creditor expects and the debtor must render."⁴ When persons refer to a breach of a contract, they note a missing or a faulty performance.

The Civil Code of 1870 plainly recognized the importance of bargained-for performances from the phases of formation to dissolution, including a preference for the remedy of specific performance in the event of a breach of an agreement.⁵ Put another way, the Civil Code favored the courts granting each party the benefit of his bargain, irrespective of the failure of an obligor to perform prior to judicial intervention.

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1. La. Civ. Code arts. 2013, 2015, 2016.

2. La. Civ. Code art. 2013 cmt. b.

3. 1 Saul Litvinoff, *Obligations* § 1.3, at 6-7, in 5 *Louisiana Civil Law Treatise* (1992).

4. *Id.*

5. See *Concise Oil & Gas v. Intrastate Gas Corp.*, 986 F.2d 1463, 1471 (5th Cir. 1993); *J. Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So. 2d 896, 897-99 (La. 1981).

In this vein, the Civil Code of 1870 followed a two-tier system for classifying breaches based on the gravity of the obligor's conduct. Article 1931 of the Civil Code of 1870 provided this: "A contract may be violated, either *actively* by doing something inconsistent with the obligation it has proposed or *passively* by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract."⁶ Under Article 1932 of the Civil Code of 1870,⁷ should an obligor actively breach an agreement—for instance, by repudiating his duty to perform—the creditor had a right to damages from the date of the breach due to the non-performance, without putting the debtor in default. In the event the obligor passively breached his promise of performance—for example, by not performing in a timely manner—Article 1933 of the Civil Code of 1870⁸ compelled the creditor to place the debtor in default in order to recover moratory losses.⁹ Even in default, the non-performing obligor still, as a general proposition, had the opportunity to perform.¹⁰

The creditor's act of putting the obligor in default, aside from its legal consequences, was a mechanism for the creditor and the law to impress upon the debtor the significance of his performance. When an obligor simply was tardy in fulfilling his promise and had evidenced no repudiation of it, the Civil Code afforded the debtor the rights of notice (from the creditor) and an opportunity to perform, in many cases salvaging the bargain of the parties. Generally speaking, only when an obligor took action contrary to his promise serious enough to constitute an active breach of his representations did he lose the opportunity to correct his ways. And consistent with its preference for enforcing the parties' promises of performance, with each party receiving the benefit of his bargain, the Civil Code of 1870 did not contemplate extrajudicial dissolution.

As a theoretical proposition and as a way of explaining dissolution, Article 2046 of the Civil Code of 1870 stated that "a resolutory condition . . . [existed] in all commutative contracts," reflecting the dependency of the performance of

6. La. Civ. Code art. 1931 (1870) (emphasis added).

7. La. Civ. Code art. 1932 (1870): "When there is an active violation of the contract, damages are due from the moment of the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action." *E.g.*, *Marek v. McHardy*, 234 La. 841, 101 So. 2d 689 (1958); *Van Denburgh v. H.T. Higgonbotham, Inc.*, 168 La. 461, 122 So. 581 (1929).

8. "When the breach has been passive only, damages are due from the time that the debtor has been put in default." La. Civ. Code art. 1933 (1870). That general idea had a number of exceptions, including performances when time was of the essence and when the parties agreed upon a definite time for performance.

9. *E.g.*, *Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain*, 659 F.2d 1314 (5th Cir. 1981); *Savoy v. Tidewater Oil Co.*, 218 F. Supp. 607 (W.D. La. 1963), *aff'd*, 326 F.2d 757 (5th Cir. 1964); *Andrew Development Corp. v. W. Esplanade Corp.*, 347 So. 2d 210 (La. 1977); *Williams Lumber Co. v. Stewart Gast & Bro.*, 21 So. 2d 773 (La. App. Orl. 1945). See *Makofsky v. Cunningham*, 576 F.2d 1223, 1231 n.12 (5th Cir. 1978).

10. *E.g.*, *Watson v. Feibel*, 139 La. 375, 388-90, 71 So. 585, 597 (1916).

the parties' mutual promises.¹¹ Save in certain circumstances, should one party fail to perform, the mutual promises of performances still had meaning and the contract was not "dissolved of right."¹² Rather, the party not in default had to sue for dissolution of the contract (with or without a request for damages) or ask the court to order the debtor to perform. As one panel stated, "[i]t is not disputed that dissolution of a contract may only be by judicial decree and that a party may not unilaterally declare a dissolution, or have the power to do so under the terms of the contract."¹³

When a party not in default commenced a suit seeking dissolution, a court considered several factors in deciding whether to terminate the bargain or to allow the party in default to perform. These guides included the following: the nature of the delay; the extent of the debtor's performance; the economic impact of the alleged breach; and the good faith of the parties.¹⁴ Further, Article 2047 of the Civil Code of 1870 charged the courts with the authority, in essence, to recast the terms of the contracts before them—to grant a party in default more time to perform.¹⁵ But only to a point. When a court determined that the debtor's delay in performing was significant and that his late performance did not mesh with his intentions as well as the expectations of the creditor at the time they contracted, it dissolved the pact¹⁶ and often awarded damages in favor of the disappointed creditor.

11. Article 1768 of the Civil Code of 1870 defined commutative contracts as "those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other." The revision shortens this wording: "A contract is commutative when the performance of the obligation of each party is correlative to the performance of the other." La. Civ. Code art. 1911. When "two parties have bound themselves reciprocally so that each will render to the other a performance in exchange for the other's counterperformance," Litvinoff, *supra* note 3, § 16.61, at 553, they have entered a commutative arrangement. In the sense that all squares are rectangles but not all rectangles are squares, a commutative contract is bilateral but a bilateral contract may concern reciprocal obligations/performances that are not equivalent or correlative. See La. Civ. Code art. 1911 cmt. b. In any event, the revision's concept of dissolution does not rest upon the legal fiction of the happening of an implied resolutive condition. La. Civ. Code art. 2013 cmt. b.

12. La. Civ. Code art. 2047 (1870). *E.g.*, *Voitier v. Hagan*, 489 So. 2d 1280 (La. App. 1st Cir. 1986).

13. *Pembroke v. Gulf Oil Corp.*, 454 F.2d 606, 611 (5th Cir. 1971). See *Reed v. Classified Parking System*, 324 So. 2d 484, 489-90 (La. App. 2d Cir. 1975).

14. *E.g.*, *Waseco Chem. & Supply Co. v. Bayou State Oil Corp.*, 371 So. 2d 305, 307-10 (La. App. 2d Cir.), writ denied, 374 So. 2d 656 (1979); *Thompson v. Bullock*, 236 So. 2d 892, 896-97 (La. App. 3d Cir.), writ denied, 256 La. 894, 240 So. 2d 231 (1970).

15. La. Civil Code art. 2047 (1870):

In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutive condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to the circumstances, have further time allowed for the performance of the condition.

A few articles of the Civil Code of 1870 negated the judiciary's discretion. *E.g.*, La. Civ. Code arts. 2563 and 2729 (1870).

16. *E.g.*, *Murray v. Barnhart*, 117 La. 1023, 42 So. 489 (1906); *Henry v. Hodges*, 323 So. 2d 207 (La. App. 1st Cir. 1975).

In *Thompson v. Bullock*,¹⁷ for example, Ila Thompson sold two apartment complexes to Raymond Bullock. Under the contract, Mr. Bullock took possession of the property and, in lieu of a down payment, placed the rent he received from the tenants in escrow for the expenses relating to the buildings and for his payment of the balance of the purchase price. In a short time, Mr. Bullock did not honor the escrow system. He diverted certain of these funds for his personal use. By a letter, Ms. Thompson demanded that Mr. Bullock perform as he had promised and, within one month, deposit all of the funds in question in the escrow account. Mr. Bullock did not comply, prompting Ms. Thompson to file a suit and to ask the court to dissolve the contract of sale.¹⁸

The trial court ruled in favor of Ms. Thompson. On appeal, the third circuit remarked that, while it had the power to grant Mr. Bullock additional time to perform, it declined to extend to Mr. Bullock any grace, for he had made no attempt to account for the funds in question or otherwise respond to Ms. Thompson's placing him in default. The court, in affirming the judgment of the district court, concluded that Mr. Bullock had acted in bad faith.¹⁹

The judicial discretion contained in Articles 2046 and 2047 of the Civil Code of 1870 invited the courts to police and to weigh the severity of contractual disputes and not axiomatically put them to an end. The reporters show that the courts, in large measure, fairly supervised the remedy of dissolution, reviewing all of the circumstances surrounding the making of a contract in deciding whether each party had a reasonable opportunity to perform and whether each received (or would receive) the performance for which he had bargained.²⁰ In short, except in limited circumstances, when a commercial relationship broke down, a creditor had to go to the courts. As Dr. Litvinoff has suggested, that was a workable and a satisfactory system:

The principle of judicial dissolution appears, thus, as a necessary consequence of the overriding principle of good faith which subjects the parties to the duty of observing a *degree of tolerance* in the matter of contract performance. . . . The necessity of a judicial demand [for dissolution] affords an opportunity for the exercise of the court's sovereign prerogative of weighing all these circumstances with large discretion. It is for the court to determine whether the rendering of only partial performance by the obligor, plus the delay attending a possible completion, or the failure in performing an accessory obligation, warrants dissolution. For this purpose the court takes into consideration the extent and gravity of the failure to perform alleged by the complain-

17. 236 So. 2d 892 (La. App. 3d Cir. 1970).

18. *Id.* at 894-95.

19. *Id.* at 896-97. See *Henry v. Hodges*, 323 So. 2d 207 (La. App. 1st Cir. 1975).

20. See *Murry v. Barnhart*, 117 La. 1023, 42 So. 489 (1906); *Waseco Chem. & Supply Co. v. Bayou State Oil Corp.*, 371 So. 2d 305 (La. App. 2d Cir.), *writ denied*, 374 So. 2d 656 (1979); *Chiantella v. Mississippi Mud, Inc.*, 170 So. 2d 897 (La. App. 4th Cir. 1965).

ing party, the nature of the obligor's fault, the good or bad faith of the parties involved, and also the surrounding economic circumstances that may make the dissolution opportune or not.²¹

II. DISSOLUTION UNDER ARTICLES 2013 THROUGH 2024 OF THE REVISED CIVIL CODE

By Act 331 of 1984, the legislature amended and reenacted Articles 2013 through 2024 of the Civil Code, concerning the dissolution of contracts. In pertinent part, Article 2013 provides, "[w]hen the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, *to regard the contract as dissolved*. In either case, the obligee may recover damages."²² Delayed or defective performance may constitute an obligor's failure to perform.²³ The revised Civil Code does not state that as a passive breach of a contract, for in the revision the legislature suppressed the concepts of active and passive breach of contract.²⁴ The Civil Code retains the concept of default, although its consequence ostensibly shrinks to a skirmish about damages for delay.²⁵ Notably, the revised articles do not detail the circumstances that trigger the ability of a creditor to treat the contract as dissolved. However, there exist several clear-cut limitations on the creditor.

When a debtor has substantially performed, Article 2014 bars a court and a creditor from dissolving an agreement. Additionally, when a debtor has partially performed but the performance is not significant enough to bar a court or a creditor from terminating the arrangement, the obligor may recover the value of his efforts.²⁶

Article 2015 establishes, in line with the articles on putting in default,²⁷ a notice procedure in the event of a delayed performance. When the debtor fails

21. 1 Saul Litvinoff, *Obligations* §§ 269-270, at 508-11, in 7 *Louisiana Civil Law Treatise* (1992) (emphasis added).

22. La. Civ. Code art. 2013 (emphasis added).

23. La. Civ. Code art. 1994.

24. La. Civ. Code art. 1989 cmt. f: "The distinction between active and passive breach has been abandoned."

25. Comment (f) to Article 1989 of the Civil Code reads, in part, as follows: "There is no need for that distinction [between active and passive breach] in this revision, where the usefulness of putting in default is confined to marking a starting point for delay damages."

26. La. Civ. Code art. 2018. This is a recovery on the contract. "Contracts have the effect of law for the parties . . ." La. Civ. Code art. 1983. When there is no contract, a party who has suffered a loss in a commercial context—flowing from the conduct of another person—may have a remedy in quasi-contract. Article 2298 recognizes the *actio de in rem verso* (or claim for unjust enrichment) when a person "has been enriched without cause at the expense of another." See Bruce V. Schewe and Vanessa Richelle, *The "New and Improved" Claim for Unjust Enrichment—Codified*, 56 La. L. Rev. 663 (1996).

27. La. Civ. Code arts. 1989-2000. See J. Denson Smith, *The Cloudy Concept of Default*, 12 Inst. Min. L. 3 (1965).

to perform, the creditor may serve the obligor with notice that he (the creditor) will consider the contract dissolved should the debtor not perform within a certain, reasonable time.²⁸ When, however, the performance no longer has "value to the obligee" or if "it is evident the obligor will not perform," Article 2016 states that the creditor, without any notice to the debtor, may consider the contract at an end.

Comment (d) to Article 2015 reminds creditors that, in order to recover moratory damages, they must place their debtors in default. Under the Civil Code of 1870,²⁹ in the case of a passive breach, after receiving a notice of default the non-performing debtor still had an opportunity to perform.³⁰ The revision continues the ability of a tardy debtor to perform, although Article 2015 condones the creditor setting a definite (though reasonable) time for the debtor's performance. That is a change from the judicial gloss upon the Civil Code of 1870. For example, in *Temple v. Lindsay*,³¹ the Supreme Court of Louisiana commented that "[a]n obligee has no right to declare his obligor in default merely because in his opinion the contract was not performed with due diligence or within a reasonable time."

Comment (c) to Article 2013 states that the dissolution of the agreement occurs upon judicial declaration. A creditor, however, may take actions during the pendency of any lawsuit as if the court had already dissolved the contract.³² Indeed, both of the parties to an agreement may act unilaterally based on perceived breaches by the other. The court's opportunity to review the circumstances, therefore, comes *after* the parties likely have acted so as to make impractical an order compelling each to live up to and perform his promises.

28. La. Civ. Code art. 2015:

Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. *The time allowed for that purpose must be reasonable according to the circumstances.*

The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

(emphasis added).

29. La. Civ. Code arts. 1931-1933 (1870). See *Mississippi River Grain Elevator v. Bartlett & Co., Grain*, 659 F.2d 1314 (5th Cir. 1981); *Savoy v. Tidewater Oil Co.*, 218 F. Supp. 607 (W.D. La. 1963), *aff'd*, 326 F.2d 757 (5th Cir. 1964); *Andrew Development Corp. v. W. Esplanade Corp.*, 347 So. 2d 210 (La. 1977); *Marek v. McHardy*, 234 La. 841, 101 So. 2d 689 (1958); *Williams Lumber Co. v. Stewart Gast & Bro.*, 21 So. 2d 773 (La. App. Orl. 1945). See also *Makofsky v. Cunningham*, 576 F.2d 1223, 1231 n.12 (5th Cir. 1978); *Van Denburgh v. Higgonbotham*, 168 La. 461, 122 So. 581 (1929).

30. *E.g.*, *Mississippi River Grain Elevator v. Bartlett & Co., Grain*, 659 F.2d 1314, 1320 (5th Cir. 1981) ("A putting in default requires notice to the other party of the alleged contractual breach and the allowance of a reasonable opportunity to perform."). See *McDowell v. PG&E Resources Co.*, 658 So. 2d 779 (La. App. 2d Cir. 1995).

31. 182 La. 22, 35, 161 So. 8, 11 (1935).

32. James J. Hautot, *Contract Dissolution*, 45 La. L. Rev. 783, 786 (1985).

The effect of dissolution is to place the parties in the situation that existed before they entered the contract.³³ "If restoration in kind is impossible or impracticable, the court may award damages."³⁴ The redactors also included provisions intended to protect the interests of innocent third parties. First, Article 2020 provides that, when a contract involves more than two parties, a breach by one party does not affect the agreement relative to the other parties, unless the performance of the party in breach is essential to the contract. Second, Article 2021 recites more generally that "[d]issolution of a contract does not impair the rights acquired through an onerous contract by a third party in good faith."

Under Article 2013 of the Civil Code, the courts retain the power to grant a breaching party additional time to perform "in cases of judicial dissolution." But Articles 2013, 2015, and 2016 lay out a scheme for a creditor to take unilateral action—to regard a contract as dissolved—not so restrained. While the courts under the Civil Code of 1870, except in rare instances, had the opportunity to review the circumstances of each case to decide whether to dissolve or to enforce agreements, the revision purports to limit the supervisory powers of the bench.

The comments to Articles 2013 and 2015 contend that the revision does not change the law but, instead—citing *Hay v. Bush*³⁵ and *Texala Oil & Gas Co. v. Caddo Mineral Lands Co.*³⁶—codifies the jurisprudence recognizing an obligee's right to consider a contract dissolved in certain circumstances. That may represent an overstatement of those two decisions. In both of those cases, the creditors relied upon specific language in the contracts granting them the right to pronounce termination of the arrangements upon the happening of certain events.

Specifically, Alexander Hay bound himself to construct a house for Rufus Bush. The writing evidencing their bargain expressly ceded to Mr. Bush the right to terminate the agreement should Mr. Hay fail to meet the construction deadlines. When Mr. Hay did not meet the performance timetable, Mr. Bush invoked his right to cancel the contract.³⁷ Similarly, *Texala Oil Gas Co.* involved a mineral lease containing a clause requiring Texala Oil & Gas Co. to conduct continuous operations after the primary term of the lease or, should operations cease for sixty days, the lessor had the right to consider the lease at an end. After the primary term of the lease, Texala Oil & Gas Co. did not operate for more than sixty days. As a result, Caddo Mineral Lands Co. rightfully terminated the lease.³⁸

33. La. Civ. Code art. 2018. See Hautot, *supra* note 32, at 794.

34. La. Civ. Code art. 2018.

35. 110 La. 575, 34 So. 692 (1903).

36. 152 La. 549, 93 So. 788 (1922).

37. 110 La. at 578-79, 34 So. at 693.

38. 152 La. at 561, 93 So. at 793. The legislature's adoption of the Mineral Code in 1975 negated the rationale of *Texala Oil & Gas Co.* Under Article 133 of the Mineral Code, La. R.S. 31:133, the lessor must place the lessee in default in order to seek a *judicial cancellation* of the lease.

In each of these cases, the obligor did not perform seasonably despite the terms of the agreements expressing that the time of performance was of the essence. In that light, the courts, even against the backdrop of Articles 2046 and 2047 of the Civil Code of 1870, did not allow the delinquent debtors additional time to perform. So, it really is of little moment whether the courts or the creditors "dissolved" the bargain. By its wording, however, Article 2013 of the Civil Code reaches beyond the situations illustrated in *Hay v. Bush* and *Texala Oil & Gas Co. v. Caddo Mineral Lands Co.* And that is troubling.

III. THOUGHTS ON EXTRAJUDICIAL DISSOLUTION OF CONTRACTS

Under the revision, the contracting parties have more freedom to act when their bargains unravel. In particular, Article 2013 offers a remedy to a creditor tired of waiting upon a delinquent debtor. And, although the parties ultimately must still turn to the courts for pronouncements of dissolution, they may act as though their contracts have concluded before consulting the bench. That, without question, provides "a measure of freedom for contracting parties not always available prior to the . . . revision."³⁹ In most instances, the idea of non-judicial dissolution—or contractual termination by declaration—probably makes sense and works. But the fundamental flaw in taking this matter out of the hands of the courts and, further, from denying the courts an opportunity to salvage the arrangements (by ordering a debtor to perform and by directing a creditor to accept a late performance) rests altogether too much upon the shaky footing of the up-front intentions and the good faith of the contracting parties. Given that the subject of the discussion is dissolution—with hard feelings and finger pointing typically attending the situation—no one should doubt that the parties to the agreement are not working in unison. Both the creditor and the debtor are apt to color writings or other evidence that will surface during the litigation of their dispute with recitations that serve their interests. Thus, the revision admits into this already testy arena of sorting through contractual disagreements a potential for abuse by a creditor seeking to gain an unfair advantage or to avoid performing his own obligations, especially when the delay in the debtor's performance is not really significant. A look at two judicial opinions may amplify this concern.

*Mennella v. Kurt E. Schon E.A.I., Ltd.*⁴⁰ demonstrates the interaction between Articles 2013, 2015, and 2016 of the Civil Code. Opal Mennella purchased from Kurt E. Schon E.A.I., Ltd. ("Schon") a 300 year-old painting by the Flemish master Sir Anthony Van Dyck. Mrs. Mennella agreed to pay Schon a total of \$350,000 for the painting—\$50,000 upon the execution of the contract and the balance several months later. The painting never left Schon's possession.⁴¹ Mrs. Mennella,

39. Hautot, *supra* note 32, at 796.

40. 979 F.2d 357 (5th Cir. 1993).

41. *Id.* at 359.

however, did not meet her performance deadlines. At the end of the six months, she had paid Schon only \$90,000 of the \$300,000 that she owed.⁴²

Mrs. Mennella then made an about face. She repudiated the value of the painting, refused to make further payments, and demanded that Schon return to her the \$140,000 that she had paid. In response, Schon wrote Mrs. Mennella a letter demanding that she pay the purchase price in full and stating that, if she did not pay within five days, it would again list the painting for sale.⁴³ Mrs. Mennella did not respond to this letter.⁴⁴ One week later, Schon again wrote Mrs. Mennella to inform her that it considered the sale cancelled. Schon did not return to Mrs. Mennella the \$140,000 that she had paid.⁴⁵ Within six months, Schon sold the painting at an auction in London for \$1.4 million. Before she knew of the sale in London, Mrs. Mennella filed a suit against Schon, seeking the court's rescission of the contract and Schon's return of the \$140,000 that she had paid. Upon learning of Schon's sale in London, Mrs. Mennella amended her suit, averring that she owned the painting and that Schon had converted her property. The trial court ruled that Schon had to return to Mrs. Mennella her payments plus interest but that she had no right to the proceeds from the sale in London.⁴⁶

On appeal, the Fifth Circuit determined first that Mrs. Mennella and Schon had validly contracted concerning the sale of the painting and, consequently, title to the painting passed to Mrs. Mennella at the time they executed the agreement.⁴⁷ Schon, of course, had a security interest in the painting and it was entitled to demand performance from Mrs. Mennella. In that light, the court decided that Schon acted properly in considering the contract dissolved when Mrs. Mennella continually failed to perform despite its written demands. The dissolution terminated Mrs. Mennella's property rights in the painting.

As the appellate court saw it, when Mrs. Mennella refused to perform, Schon had three options: "(1) sue to enforce performance or seek judicial dissolution, (2) continue to seek performance albeit in an untimely manner, and/or (3) put

42. At this time, Mrs. Menella demanded authentication of the painting, purportedly to secure a loan to pay Schon the remainder of the purchase price. Schon provided Mrs. Mennella with two appraisals. *Id.*

43. Schon did not offer to return to Mrs. Mennella the \$140,000 that she had paid to it. *Id.*

44. Additionally, she did "not make or tender the . . . price or object to the time period in which Schon demanded payment." *Id.*

45. Four months later, "Schon offered [either] to . . . refund \$95,000, representing the consideration paid less \$45,000 for the cost of authentication and commission paid to Schon's salesman, or to give Mrs. Mennella \$140,000 in store credit. Mrs. Mennella rejected both offers." *Id.*

46. It appears that both the trial court and the appellate panel followed something in the nature of a constructive trust analysis. *Id.* at 360 n.6 ("If the . . . contract transferred title and Schon was not within his [sic] rights to sell the painting, only then would he [sic] be liable in damages under a conversion theory.").

47. La. Civ. Code art. 2456: "Ownership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid."

Mrs. Mennella in default and, if she failed to correct same, regard the contract as dissolved."⁴⁸ Schon, unable to prompt Mrs. Mennella's performance, took the third choice, effectively ending the contract by "extrajudicial dissolution" and freeing the painting for sale at the auction in London.⁴⁹

While the Fifth Circuit noted the soundness and the practicality of the revision's remedy of extrajudicial dissolution in the case before it,⁵⁰ the court also pondered the problem posed by the creditor's freedom:

The Civil Code is not exhaustive in its description of the circumstances that will entitle the obligee "to regard the contract as dissolved" without litigation. Because the pertinent articles are relatively new, the Louisiana courts have not yet expounded on the issue. Whether repudiation is sufficiently clear to allow dissolution without litigation undoubtedly will pose a difficult question in some cases.⁵¹

The real difficulty, however, is not in the event of a debtor's repudiation—an active breach according to the Civil Code of 1870. That is ground where extrajudicial contractual dissolution seems workable. The specter of abuse is that revised Article 2013 may not limit unilateral action by obligees to circumstances involving active breaches by debtors. When a debtor is late in performing and a creditor desires to withdraw from the bargain for reasons wholly unrelated to the obligor's delinquency—for instance, the creditor's inability to perform or a "better deal" with some other person—the revision provides an unscrupulous creditor with an opportunity, simply by saying so, to deny the debtor the benefit of his bargain. To be sure, the debtor may sue the creditor, asking the court to enforce their arrangement but, during the pendency of the suit, the creditor will not honor their arrangement. That may chill the efforts of persons wishing to live up to their promises and wanting others to do the same, for, read beyond the context of active breaches, the revision places the onus upon a party suing to enforce an agreement that the other party does not recognize without an imprimatur of risk (that he may have acted rashly, erroneously, or, even worse, in bad faith).

48. 979 F.2d at 363.

49. In nearly all respects, Schon acted on the up and up. Schon gave Mrs. Mennella a fair opportunity to pay the balance of the purchase price. Mrs. Mennella refused. Schon, after notice, considered the contract dissolved and re-sold the painting. Schon, however, kept Mrs. Mennella's partial payment after it terminated the contract. In other words, Schon retained Mrs. Mennella's partial performance while proclaiming the agreement a non-event. Schon attempted to justify its conduct by urging that a seller may declare a sale dissolved and simultaneously retain the buyer's partial payments to establish a fund out of which it may satisfy its demand for damages (should it recover them). Stunningly, the court approved of Schon's self-help behavior: it may hold "the funds necessary to compensate for the loss [it] reasonably believes it will suffer." *Id.* at 364. There is no basis in the law of Louisiana for this notion.

50. "Schon's letters were sufficient to put Mrs. Mennella in default, a prerequisite to dissolution by notice. We find them sufficient, under the circumstances, to dissolve the contract." 979 F.2d at 363 (footnote omitted).

51. *Id.* at 363.

For instance, let us suppose that the background of a dispute like the one in *Mennella* is as follows: a vendor sells a movable to Mrs. *M* for a price of \$10,000; Mrs. *M* agrees to pay the vendor \$5,000 at the time of the sale and the balance within sixty days; the vendor retains the possession of the movable until Mrs. *M* pays the entirety of the price; some fifty days following the sale, the vendor learns that Mr. *L* wishes to purchase the movable for \$100,000; on the sixty-first day after the sale, the vendor writes Mrs. *M* and recites that, should Mrs. *M* fail to pay the \$5,000 that she owes within three days, it will consider the contract dissolved; on that third day, Mrs. *M* telephones the vendor and says that she will pay the balance the next day; the vendor proclaims Mrs. *M*'s proposal is unacceptable and declares the agreement dissolved, confirming that in writing (via facsimile); one week later, the vendor sells the movable to Mr. *L* for \$100,000. This surely is a different case. While the hard deadlines favor the vendor, Mrs. *M*'s undisputed ownership of the movable is rather meaningless if a court were to read Article 2013 of the Civil Code to authorize the vendor to maneuver her out of it by reason of a rather trivial delay in her performance—far short of an active breach.

Moreover, unwarranted extrajudicial dissolution runs afoul of Louisiana's rejection of self-help remedies. A look at *Arena v. K Mart*⁵² should illuminate this point.

Mr. and Mrs. Arena shopped at a K Mart for a television. The assistant manager showed them several models. They asked about a particular set. According to his testimony, he quoted them a price of \$609.00. Mr. and Mrs. Arena elected to purchase this set. At the check-out counter, the cashier announced the price as "\$341.05."⁵³ Mr. Arena wrote a check for the lower price, and he and his wife left the store with the television. The assistant manager then realized that K Mart charged Mr. and Mrs. Arena the wrong price for the set. He so informed the store manager who followed Mr. and Mrs. Arena into the parking lot and, with the help of another employee, forcibly retrieved the television from them. Thereafter, Mr. and Mrs. Arena brought a suit against K Mart for conversion of their property.⁵⁴

The trial court found in favor of K Mart. On appeal, the first circuit affirmed and held that any contract between K Mart and Mr. and Mrs. Arena was void as a consequence of the error of the parties regarding the price of the set. Judge Watkins dissented, commenting that K Mart did not have the authority to act unilaterally. K Mart's proper course of action was to bring a lawsuit "to set aside the sale. For the employees of K Mart to attempt by force to obtain the return of the television set constituted a tortious violation of the Arena's right of ownership."⁵⁵ Judge Watkins' perspective is irrefutable. One of your authors previously commented upon the majority's opinion:

52. 439 So. 2d 528 (La. App. 1st Cir.), writ denied, 443 So. 2d 585 (1983).

53. 439 So. 2d at 529.

54. *Id.* at 529-30.

55. *Id.* at 531 (Watkins, J., dissenting).

As . . . ultimately proven in this lawsuit, K Mart labored under material error . . . in forming a contract with the plaintiffs, but this error cast upon the agreement only the shadow of a relative nullity. Presumptively, the contract of sale was valid and . . . ownership of the television set passed to Mr. and Mrs. Arena. While "K Mart was free to pursue judicial action in the courts to have the sale set aside for error . . . until judgment was secured . . . the television set belonged to the Arenas." Simply put, the contract . . . [was not] void.⁵⁶

As an analogous matter of policy, contracting parties should not take matters into their own hands when their understandings break down. While the courts of Louisiana do not exist simply to mediate differences between the parties to a contract and to smooth over disagreements, in passive breach scenarios it is not a good idea to cast aside the respect the courts enjoy with the contracting parties and the public to resolve disputes fairly and impartially. The judicial expertise, the judicial method, and the judicial temperament will often assist parties in commercial relationships to receive what they bargained for and expected.

IV. CONCLUSION

The revised articles of the Civil Code concerning contractual dissolution grant to the parties more power to control the termination of contracts, perhaps to limit litigation over delayed performance and other breaches of contract. In general, that is a laudable plan. Yet, by placing the steps of shuffling the deck and dealing the cards—in the context of disputes regarding performances and dissolution of agreements—in the hands of a party to the bargain and not with the courts, the legislation, read broadly, plants the seeds of a number of problems, namely the risk of a creditor's premature and unfair conduct in his interest and against his obligor. The courts may limit the likelihood of abuse in the realm of extrajudicial dissolution by construing Article 2013 against the backdrop of the well-developed concepts of active and passive breaches. That is a sensible approach, for repudiations are different in kind and not only in degree from tardy performances.

56. Bruce V. Schewe, *Developments in the Law, 1983-1984—Obligations*, 45 La. L. Rev. 447, 451 (1984) (footnote omitted) (quoting 439 So. 2d at 531 (Watkins, J., dissenting)) (emphasis in original).

Certainly, the limited stress and privacy intrusion suffered by the purchasers influenced the outcome of the case; after all, they were barely outside the store when the problem arose. Be that as it may, the employees of K Mart had no more right unilaterally to declare the contract rescinded and take back the television set in the parking lot than if they buyers had arrived home before the price discrepancy was detected. In the latter situation, no one should question the lack of authority of employees of K Mart to recover the television *without judicial supervision*.
Schewe, *supra* at 451 (emphasis added).